Furthermore, Ms. Sommi misses the obvious point that, regardless of how a carrier would have liked the facility to be provisioned, it is nonetheless competing using the special access service. Where a carrier is successfully providing service via any alternative to a UNE, the carrier cannot be said to be impaired without access to that UNE.

6. Second, carriers have argued that special access is not an economically feasible method of provisioning service to end users. (AT&T, p. 97; Loop and Transport CLEC Coalition, p. 40, 59) However, BellSouth has identified 106,640 buildings in its territory in which CLECs are serving end users using DS1 circuits, either purchased as special access services, UNEs, or both. The majority of these buildings are served by carriers that are using special access exclusively to serve end users.

Table 1 shows a sample of 15 buildings where carriers are using both special access and UNEs by the type of service chosen by the carrier to serve those buildings. In five of these buildings, at least one CLEC is using both UNE and special access DS1s to serve its customers. Apparently, these carriers can obtain UNEs, but have chosen to use special access in some cases. **[BEGIN PROPRIETARY DATA]**

Table 1

[END PROPRIETARY DATA]

7. These carriers may argue that commingling and use restrictions are the reason the carrier uses both services. But, in most cases, the carrier has more special access DS1s than UNE DS1s and, in one case, the UNE is a stand-alone loop not subject to the EEL use restrictions and where commingling is not an issue. Nevertheless, whatever the reason the carrier is using both services, the carrier decided it was a good business decision to provide service to these end users.

8. Third, carriers argue that one of the only reasons CLECs have ordered special access is because ILECs have not been willing to combine UNEs for CLECs or convert them from special access to UNEs. But BellSouth has made available EEL conversions since October 1999 and has provisioned orders for new combinations of UNEs since approximately February 2000. The examples provided by the Loop and Transport CLEC Coalition of carriers who have purportedly experienced trouble converting combinations of elements to UNEs, XO (p. 58) and Xspedius (Falvey ¶39), do not even involve requests for conversions of EELs, but rather requests for conversions of stand-alone special access services to stand-alone UNEs. Neither carrier has, or apparently is even willing to negotiate, terms in its interconnection agreement that would allow for such a conversion.

9. Xspedius claims that the *Triennial Review Order*'s instructions on this issue are self-effectuating, which is simply not true. The terms of all of BellSouth's interconnection agreements require that the parties agree in writing to amend the terms of the interconnection agreements, including those that are required as a result of a change in law.

10. In contrast, XO recognizes that an amendment is required but claims that it has attempted to amend its agreements to conform to the *Triennial Review Order*'s requirements. However, at least with BellSouth, XO has refused to incorporate, or even discuss, terms regarding issues from the *Triennial Review Order* with which it does not agree.

11. In December 2003, BellSouth sent XO an amendment to incorporate all the terms from the *Triennial Review Order* into the interconnection agreement, including but not limited to the finding that ILECs were now obligated to convert special access circuits to stand-alone UNEs. Apparently, XO did not want to incorporate all of the provisions of the *Triennial Review Order*, as it refused to engage in any substantive negotiations regarding a new interconnection agreement or the *Triennial Review Order* amendment. Subsequently, XO filed its third New Business Request ("NBR"), which is a request for an extra-contractual service that is not contemplated under the interconnection agreement and does not constitute a request pursuant to the Act, for a conversion of stand-alone loops to UNEs. Because the interconnection agreement does not contain a requirement to perform this service for XO nor the terms for such work, the parties have continued to disagree as to appropriate price XO should pay and the appropriate process to convert the special access circuits to UNEs. In late September 2004, XO filed complaints with the public service commissions in three states. However, if XO had executed the *Triennial Review Order* amendment, it could have obtained the contractual right (with the corresponding TELRIC pricing) for the service it had previously requested through an NBR.

12. In addition, XO and Xspedius have had the right to order all of these circuits as UNEs since 1996, as have all CLECs, and instead chose to provide service via special access services. **[BEGIN PROPIETARY DATA]**

[END PROPRIETARY DATA]

13. Fourth, carriers claim that special access products do not exist as a substitute for UNEs. (Alpheus, p. 3, 17; Mountain, p. 5) In BellSouth's region, this is simply not true. BellSouth has tariffed offerings for dry fiber, which is very similar to UNE dark fiber, and interoffice facilities may be ordered from BellSouth's tariffs to connect collocation facilities.

14. Fifth, commenters argue that BellSouth's special access services are too expensive to use competitively. This argument is impossible to reconcile with the fact that carriers are using special access extensively to provide service and presumably are doing so economically. In fact, rather than offering evidence that it is impaired without access to UNEs, MCI's comments underscore the lack of impairment that exists by virtue of the availability of special access, even though MCI apparently would like to pay cost-based rates for the underlying facilities.

- "MCI has made *extensive* use of special access tariffs to purchase DS1-based services, notwithstanding the extraordinarily high prices the ILECs charge for such services." (p. 167, emphasis added)

- "...MCI continues to *rely* on incumbent LEC facilities – generally provided pursuant to the incumbent LEC's special access tariff – to reach the *vast majority* of MCI's high-capacity customer locations." (Mills ¶6, emphases added)

- "...[MCI] has also used incumbent LEC special access to enter new markets such as the business local exchange market." (Mills, ¶10)

- "The fundamental problem with MCI's current *reliance* on incumbent LEC special access is that the price that MCI must pay for a special access circuit is extremely high – much higher than the price MCI would pay for the same circuit if it could be obtained as unbundled elements." (Mills, ¶16, emphasis added)

- "Whereas MCI's local network reaches [redacted] incumbent LEC central offices, MCI purchases incumbent LEC special access interoffice transport to several *thousand* incumbent LEC central offices." (Mills ¶8, emphasis in original)

15. In other words, MCI is competing by relying on extensive use of special access services; it would just prefer to have access to these inputs at cost-based rates. That MCI may be limited to competing in certain segments of the markets it serves because of the cost of special access is irrelevant. (Mills, ¶16) BellSouth agrees with SBC's position that "[i]mpairment isn't measured on a customer-by-customer basis...the question is whether they can economically enter and serve an entire market...without unbundled access to ILEC facilities." (p. 91)

16. The Loop and Transport CLEC Coalition tries to cloud the issue by claiming that carriers that are providing end users service using special access are special cases, and point to Time Warner Telecom, which the Loop and Transport CLEC Coalition claims, "is unusually reliant on carrier revenues, and is not as focused as other CLECs on the competition for end user customers that the Commission has

repeatedly stated is its primary goal." (p. 64) Interestingly enough, it is my understanding that Time Warner serves business customers, as do the members of the Loop and Transport CLEC Coalition. Also, the mere fact that Time Warner has a different business plan than other CLECs is irrelevant; since the inquiry is whether competition is possible without access to UNEs, the particular form of that competition is inconsequential.

17. As a last ditch effort to confuse the Commission regarding the use of special access to provide service to end users, carriers argue that evidence that wireless carriers are thriving while using special access is not relevant to impairment for CLECs since the issues they face in a market are different. (Loop and Transport CLEC Coalition, p. 53) Regardless of the merits of this argument, in examining its records regarding competitive usage of special access, BellSouth removed services where the end user customer was listed as the requesting CLEC; other carriers, including wireless and interexchange carriers; a collocation arrangement; or simply a piece of telecommunications equipment. The data presented in my affidavit and in this affidavit do not include wireless carriers, or any carriers wholesaling BellSouth's special access services.

Trigger Analysis

18. Several parties advocate that the Commission extend the methodology of the *Triennial Review Order* through continued use of trigger tests when evaluating impairment for high-capacity facilities. Without regard to the legality of such a proposition, given BellSouth's experience in the state proceedings, such a course of

action is unlikely to provide an accurate picture of the state of competition and will certainly not be as "easily administered" as some commenters would have the Commission believe.

19. At the most basic level, the triggers set up by the Commission in the *Triennial Review Order* are unworkable simply because the information required to determine where the triggers are met is almost exclusively in the hands of CLECs or even companies that are not telecommunications providers subject to the jurisdiction of the regulating bodies, such as utility companies or fiber wholesalers. In spite of Sprint's assertion to the contrary (p. 29), companies that have provisioned facilities have shown a persistent unwillingness to report competitive information to regulators. Sprint's belief that the deploying company would be able to positively impact its business case may or may not be true, but that would not explain why Sprint failed to disclose any relevant information about its alternative high-capacity facilities. Whatever the case, experience shows that relying on data reported by deploying companies does not produce accurate information on the real state of competitive deployment.

20. Even assuming that the requested information was available, which it is not, the Commission cannot rely on the existing record in the state cases due to the interruption in the discovery process. The record is simply incomplete as carriers showed an amazing ability to use, and in some cases invent, loopholes to avoid reporting facilities that met one of the *Triennial Review Order* triggers. These carriers took every opportunity to obscure the issue at hand – where competitive facilities have been deployed – and instead played semantic games. I will describe

the major issues BellSouth encountered in the state proceedings, which BellSouth would expect to arise should the Commission decide to rely on the *Triennial Review Order* triggers or a similar set of triggers in assessing impairment.

21. First, carriers refused to report transport routes that do not directly connect ILEC central offices in spite of the Commission's specific instructions that "routes" do not have to be direct connections. During the discovery process, AT&T denied having any transport facilities in BellSouth's region, but clearly, AT&T does have facilities that connect numerous ILEC central offices to a central point where AT&T's switch is located. AT&T's comments make clear that it does not consider facilities that are not expressly deployed for the purpose of providing transport between two ILEC central offices due to a difference in network design, but which nevertheless can provide transport between two ILEC central offices connected to a single point, to be transport routes for purposes of determining if multiple carriers can move traffic between the two central offices. (p. 79-80) This position is indefensible but only illustrates the extent to which carriers will go to avoid disclosing information about their networks.

22. CLECs have made business decisions as to how to design their networks, presumably based at least in part on cost considerations. (AT&T – Fea and Giovannucci ¶76) However, these design decisions do not mean that CLECs cannot, or do not, provide transport between ILEC central offices. Selwyn notes that *direct* interoffice transport "is [not] *necessary* as a business or technical matter." (¶57, emphasis in original). MCI's comments note that the CLEC could transport traffic between the two ILEC central offices either by using its switch (p.

143) or not. "...[W]here the CLEC has fiber-based collocations at points A and B, the CLEC potentially could provide dedicated DS3 transport between those points even if it not already doing so." (p. 143) MCI goes on to describe the steps needed to accomplish transport at specific capacity levels. Clearly, the design differences in CLEC and ILEC networks do not prevent CLECs from providing transport between two points on the ILEC network. While CLECs may decide not to design their networks to mirror the ILEC's due to cost considerations, they are not "impaired" without access to the ILEC's network by virtue of this decision.

23. Second, some carriers refused to report loops pursuant to the wholesale trigger if the loop did not terminate in an ILEC central office. Although it might be easier to pick up all loops from all wholesalers at the ILEC central office, carriers certainly can make other arrangements. For instance, carrier hotels are commonplace in larger urban areas and carriers wishing to participate in wholesaling clearly could chose to meet at such a location or at any other access point on the wholesaling carrier's network. The mere fact that a loop terminates at a non-ILEC location does not mean that a carrier has no alternatives in trying to serve a particular location.

24. Third, in the state cases, carriers attempted to argue that the Commission's triggers for loops should be applied to individual customer locations within a multi-tenant building. The implication is that meeting the self-provisioning trigger for loops would require an individual end user to be served by two or more competing providers in order for the trigger to apply, and, even then, the unbundling relief would only apply to the facilities serving that particular end user. This is an outcome that the Commission surely did not intend.

25. Fourth, carriers attempted to impose additional requirements on the triggers that simply did not exist. For instance, for the DS3 transport self-provisioning trigger, the Commission required that the carrier be operationally ready to use the facilities to provide dedicated DS3 transport along a route. However, as Alpheus claims in its comments, many carriers argued that the only "...actual evidence [of a carrier being 'operationally ready' to provide service is] that the CLEC is actually providing service on the given transport route at the relevant capacity level." (p. 51) Alpheus goes on to list out items that the carriers argued ILECs where required to show to prove operational readiness – none of which was required by the Commission's rules and all of which only the CLEC would have the information to show. Clearly, these carriers were attempting to rewrite the Commission's rules to avoid reporting facilities that met the Commission's triggers.

26. Similarly, carriers argued that ILECs had to show that a carrier was operationally ready along each individual route to provide wholesale services (or offering wholesale service at each location). There are at least two problems with this approach. First, carriers typically do not choose to wholesale or not wholesale at such a granular level. Second, even to the extent there are exceptions on a route- or location-specific basis, ILECs cannot be expected to have such information. The willingness to offer services to other carriers on a wholesale basis is part of each carrier's commercial strategy rather than a decision that is made at a granular level for each route and customer location. The wholesale trigger defined by the Commission in the *Triennial Review Order* did not require the carrier to currently provide wholesale service in the customer location, but only that it be willing to

offer access to its loop or transport facilities on a wholesale basis (*e.g.*, see *Triennial Review Order* ¶337).

27. Again, Alpheus provides an excellent example of the ridiculous extremes to which CLECs are prepared to go in placing the onus on the ILEC in satisfying any trigger test. According to Alpheus, the following is the "minimum" the ILEC must show for each wholesale provider: "Has sufficient systems, methods and procedures for pre-ordering, ordering, provisioning, maintenance and repair, and billing; Possess the ability to actually provision wholesale high-capacity loops to each specific customer location identified or to provide dedicated transport along the identified route; For loops, has access to an entire multi-unit customer premises; Is capable of providing transport at a comparable level of capacity, quality, and reliability as that provided by the ILEC; For transport, is collocated in each central office at the end point of each transport route; Has the ability to provide wholesale high capacity loops and transport in reasonably foreseeable quantities, including having reasonable quantities of additional, currently installed capacity; Reasonably can be expected to provide wholesale loop and transport capacity on a going-forward basis; and can provide service in a commercially reasonable timeframe..." (p. 55-56) Not only are many of these items impossible for the ILEC to know, they are practically impossible to prove to the satisfaction of a regulator.

28. CLECs also manipulated the trigger inquiry on the basis of capacity. For example, carriers took the position, as they have in these comments, that evidence of deployment of facilities equipped to provide higher capacity than the capacity in question was of no importance. For instance, carriers argued that simply because a

route met the DS3 trigger did not mean that the DS1 trigger was also met. As set forth in Mr. Milner's affidavit attached to BellSouth's Comments, once a carrier has fiber optic facilities in place, it is a relatively simple and inexpensive matter to channelized the facility to provide the specific capacities required. Commenters' statements acknowledge this fact. AT&T says, "...if an incumbent has already deployed fiber to the premises, as is usually the case, it can add substantial capacity by *merely* changing electronics in the central office." (p. 61, emphasis added) In fact, Covad affiants Derodeff, Bennet and Richman state that, "Today, most transport ...facilities are ...typically channelized to provide multiple lower capacity circuits, such as DS-3 circuits and DS-1 circuits, riding over the same SONET fiber transmission facilities." (¶49)

29. In a related issue, carriers argued, and continue to argue, that a carrier that has deployed more facilities than the *Triennial Review Order*'s maximum should not count toward the triggers, or be considered as evidence that carriers are not impaired without access to UNEs. (AT&T, p. 78, 114 n. 47) This argument ignores that when a carrier has been able to overcome entry barriers and is providing service without UNEs, there is competition, and therefore, no impairment.

30. As a final matter dealing with the *Triennial Review Order* triggers, let me correct a mistaken impression left by MCI to the effect that SBC was the only ILEC "that even attempted to make out a potential deployment case [for transport] in the states..." (MCI, p. 147) This is simply untrue. BellSouth filed cases regarding the potential deployment of transport in four states and for loops in all seven states in which testimony was filed.

QSI Study

31. Commenters seek to make much of the QSI Study purporting to identify where the *Triennial Review Order* triggers where met pursuant to its study of the records in a limited number of state impairment cases. The QSI Study, however, was conducted by a consultant hired by CompTel to testify as a witness in some of the state cases. Thus, the study can hardly be said to be "impartial" and merely regurgitates CompTel's view of impairment.

32. In addition, QSI make several other leaps that are difficult to understand. First, QSI removed records of the routes and locations identified by the ILECs if the route or location was not in a discovery response. However, in BellSouth's region a number of carriers and non-traditional telecommunications companies did not respond to discovery at all. So QSI's 'findings' disregard any ILEC or third-party data showing facilities deployment for a company that simply chose not to participate in a state impairment proceeding.

33. QSI also discounted entirely the third-party data sources that ILECs used in these cases. Although QSI criticizes the GeoResults data for not validating that CLEC-provided fiber entered the building, QSI fails to recognize the adjustments made by BellSouth to the data provided by GeoResults. BellSouth examined the data in the underlying database used by GeoResults, CLONES, and removed records wherein fiber was provided on a wholesale basis by another company. QSI also notes that, in some cases, the fiber-terminating equipment actually was owned by the end-user customer. Nevertheless, the identified equipment requires fiber to operate and BellSouth removed any records where the underlying provider appeared to be a

carrier other than the carrier listed on the equipment. The fiber, regardless of the owner of the equipment, was not provided by the ILEC.

34. AT&T affiant Beemon makes similar objections to the information in the CLONES database. Mr. Beemon claims that the information generally available to users of the CLONES database does not show the provider of the fiber for the service in question. (¶4) However, this information may be determined by comparing the companies listed in the "OTC" (Operating Telephone Company) field and in the "Description" field. The OTC field shows the provisioning company and the Description field, which is a freeform field, often lists the carrier for whom the service was provisioned.

35. Mr. Beemon further criticizes the data available in the CLONES database as being out of date. (¶5) BellSouth does not dispute that carriers are not required to keep the data up-to-date or even to populate the database at all (leaving the database without access to many records of deployment). However, even in cases in which the deploying carrier is no longer using the equipment listed in CLONES, the fiber has not been removed. It is deployed to the building and may be used again for provisioning of services.

36. Given the actions of the CLECs in the state cases and the comments of numerous parties in this proceeding, it appears that the carriers will continue to play semantic games and deny deploying more than a *de minimus* number of facilities, in spite of the fact that they clearly have.

Other Proposed Transport Impairment Tests

37. Generally, there are three main types of tests for DS3 transport to determine where competition exists proposed by commenters: (1) those that, like BellSouth's proposal, rely on a proxy – primarily business line concentration (ALTS, ATX *et al.*, McLeod, the Loop and Transport CLEC Coalition, CompTel, SBC); (2) those that rely on the capacity limits set forth in the *Triennial Review Order* (AT&T, MCI, Covad); and (3) those that rely on the *Triennial Review Order* triggers (Sprint). The proposals, or portions of proposals, that rely on the *Triennial Review Order* triggers are fundamentally flawed, as I have previously addressed. I will address the other two types of proposals in turn.

38. However, before impairment can be considered for transport elements, a "sensible definition of the markets" is required. Commenters in this proceeding have urged the Commission to continue with its route-by-route market definition. The Commission should resist this urging. The Court directed in *USTA I* that where elements are "significantly deployed" but "not literally ubiquitous", the Commission could not find impairment. Examining transport on a route-by-route basis can only have a standard of "ubiquitous" deployment for the market in question.

39. The Commission should instead view the market in the same way in which CLECs do when deciding where to deploy their facilities. AT&T and others would have the Commission believe that it only examines the demand along an individual point-to-point route. However, elsewhere AT&T admits that demand in a much larger area is considered and that there are many more variables that are important and are considered when determining where to deploy fiber. "When AT&T enters a new

market, it first builds a consolidated metro fiber network that connects network points of aggregation where demand has already proven substantial, including interexchange POPs, the strategically located (to minimize transport [costs]) collocations in incumbent LSOs, and switch/private line service nodes." (Fea and Giovannucci ¶23)

40. The reality is that carriers considers the demand in a larger geographic market, among other things, and deploy a ring to connect key points, including ILEC central offices. "...[W]hen XO constructs a Metro Fiber (MF) Ring, it does so in a manner that identifies geographically proximate commercial buildings that house as many potential customers as possible; if such customers are located in buildings that are reasonably close together, we attempt to design and build the metro ring to pass directly by as many of those buildings as possible.... The Metro Fiber Ring consists of interoffice fiber optic facilities deployed between XO's switch locations and the ILEC central offices, and collocation equipment installed in the ILEC central offices." (Tirado ¶14) KMC's typical rings extend "from KMC's switch to at least three (3) ILEC central offices [sic] collocations (the local tandem and the two central offices serving the greatest concentration of business customers)." (Duke ¶7)

41. AT&T, MCI, and Covad advocate that the Commission's ruling in the *Triennial Review Order* that carriers may have unbundled access to transport facilities up to a capacity of 12 DS3s along a route is sufficient as a nationwide determination of where impairment does not exist. However, yet again, these carriers miss the point of the impairment inquiry, which is to find non-impairment when competition is possible, regardless of whether competition already exists.

42. Further, in spite of MCI's assertion that this test addresses potential deployment (p. 128), it does not. It only addresses where a particular carrier has deployed a specific number of circuits, not where carriers could economically deploy facilities, as required by the D.C. Circuit. Given the evidence that CLECs have extensively deployed fiber optic networks and can readily provide transport at practically any capacity level, it is simply not the case that carriers are impaired on a ubiquitous basis whenever they seek to use those networks to provide transport at lower levels of capacity.

43. Proposals for DS1 impairment tests are more limited. Sprint again proposes use of the *Triennial Review Order*'s triggers (p. 28), which BellSouth does not believe is appropriate for the reasons noted above. Supra would have the Commission find no impairment on routes where two companies offer DS1 at wholesale (p. 38), even though a route-specific impairment test is neither realistic nor practical and given the enormous number of possible routes. In addition, Supra's proposal fails to address the potential for economic deployment.

44. Several commenters urge the Commission to find that CLECs are impaired nationwide without unbundled access to DS1 transport. These commenters ignore not only the potential for competitive deployment but also the actual deployment that already exists. They do, however, acknowledge that transport has been deployed extensively. "The transport market is now a mature market. CLECs have invested billions of dollars in deploying transport and have been doing so for years…It is overdeployment of facilities, not underdeployment, that has been a source of industry problems in the last few years." (Covad, p. 78-79)

45. In spite of the fact that extensive fiber transport networks have been deployed and in the face of evidence of network after network of fiber transport, these carriers try to cloud the issue by complaining that the fiber route maps supplied by the ILECs in various filings show that there are no alternative facilities since the maps "purportedly reveal all the competitive fiber facilities." (Alpheus, p. 49, 53) ILECs have never stated that these maps show all the competitive fiber facilities. Clearly, they do not, as, at least in BellSouth's case, the maps show only the fiber routes that BellSouth has been able to reasonably identify.

46. AT&T affiant Selwyn claims that the fiber routes are based on "assumptions" as to the design and operation of CLEC fiber networks rather than on "actual specific CLEC transport routes". (¶27) This simply is not true. GeoTel, the firm that provided the data regarding the fiber routes, gathers and cross-checks its information using a combination of the following: directly from the companies deploying the fiber; mapping fiber access manholes in select MSAs to identify routes; and examining public records, such as construction permits.

47. Selwyn further states that the evidence of existing fiber deployment should be discounted because the fiber networks are not separately identified. (¶27) Again, at least in BellSouth's filing, this is not the case. In all of the MSAs mapped in BellSouth's serving territory, there have been fiber networks deployed by at least one provider, and at least two fiber networks had been provisioned in all but two of the mapped MSAs.

48. Further, commenters argue that the fiber maps provided by the ILECs do not show the capacity available on the routes. As an initial matter, it is ludicrous to suggest

that DS1 transport has not been deployed because ILECs cannot show where CLECs have deployed channelization electronics along their fiber routes. That information is only available to the deploying carrier and is irrelevant due to the fact that channelization is relatively inexpensive.

49. BellSouth does not disagree that carriers typically do not deploy facilities with the sole intent of provisioning a single DS1 channel of interoffice transport. In fact, it is unlikely that any carrier has a single interoffice facility that is capable of provisioning only DS1 transport or even that is being used solely for a single DS1. Carriers deploy fiber, which can be used to provide transport at whatever level is needed by the carrier and its customers. Note again the statement made by Covad affiants Derodeff, Bennet and Richman: "Today, most transport ...facilities are ...typically channelized to provide multiple lower capacity circuits, such as DS-3 circuits and DS-1 circuits, riding over the same SONET fiber transmission facilities." (¶49) AT&T again tries to confuse the issue by correlating "...the ability to self-deploy..." with the capacity of the facility. (p. 14) However, a fiber facility is capable of carrying an almost limitless capacity, bound only by the electronics attached to it. Loop and Transport CLEC Coalition affiant Sommi acknowledges this fact. "It is important to note that the capacity of the fiber is limited by the electronics and the network architecture of the fiber rings, versus the fiber itself." (¶12)

Business Line Concentration For Assessing Transport Impairment

50. Because there is no across-the-board formula that can be used to determine where competitive deployment is feasible, most commenters agree that a proxy for identifying locations where competitive deployment is possible is needed. (ALTS, p.82, Loop and Transport CLEC Coalition p. 35).

51. Many commenters agree that business lines are a reasonable proxy that can be used to determine where competitive deployment is possible. (Alpheus p. 20-21) ALTS advocates using business access line density because "...the competitors are far more likely to have deployed their own transport in the downtown areas of the largest urban areas where large of [*sic*] groups of businesses are concentrated." (p. 79)

52. The major difference between the proposals is the specific number of business lines, which I will discuss below. However, there are other parts of these proposals that the Commission should consider and reject. First, the CLECs propose that the Commission view the market on a route-by-route basis. As discussed above, a route-by-route definition is too simplistic and does not reflect the actual marketplace considered by CLECs when deciding how to deploy facilities. In addition, a route-by-route determination will encourage arbitrage schemes designed to avoid transport costs incurred on competitive routes. Carriers will route traffic between competitive offices through impaired offices simply to take advantage of the availability of TELRIC rates, even though competitive alternatives are available. This will discourage competition along those routes where it should flourish.

53. Second, CLECs propose limiting findings of non-impairment to central offices in the top 50 MSAs in the country based on population. However, the CLECs offer no evidence that the characteristics that make central offices with a large number of business lines attractive to competitive deployment in the largest MSAs vary decisively from the characteristics of central offices with a similar number of business lines in other MSAs. BellSouth, in its study of competitive alternatives, did not find a distinguishable difference based on the MSA of the central office. Thus, this proposal is unfounded.

54. Third, CompTel and the Loop and Transport CLEC Coalition proposals include a required number of fiber-based collocations. BellSouth's proposal shows that fiber-based collocation is closely related to the number of business lines in a central office. (See Padgett Affidavit, Tables 1 and 2) There is no need to further complicate the issue by adding requirements that are already shown to have a strong relationship with a single factor. Furthermore, a minimum fiber-based collocation requirement would be difficult to administer because it is continually subject to change, depending upon the business plans of various competitors.

55. Lastly, CompTel and the Loop and Transport CLEC Coalition propose that at least two wholesale alternatives must be available. This proposal is inconsistent with the notion that the Commission's impairment analysis must consider not only those locations where competition already exists but where competition is possible. Requiring the presence of two wholesale alternatives as a prerequisite to unbundling relief ignores that latter part of the analysis.

56. BellSouth's proposal is that, for purposes of the impairment analysis for high capacity loops, transport, and dark fiber, the appropriate market is the central office and the appropriate proxy to determine impairment are central offices with less than business lines (5,000). As I explained in my affidavit, central offices with 5,000 or more business lines have a large demand for high-capacity services and allow carriers to access existing facilities on a wholesale basis, where appropriate.

57. As reflected in Table 2, BellSouth is requesting relief in only a small percentage of its central offices.

Central Offices By No. of Business Access Lines	No. of Central Offices	Percent of Total Central Offices
Below 5,000	1145	72.7%
5,000-10,000	199	12.6%
10,000-15,000	94	6.0%
15,000-20,000	56	3.6%
20,000-25,000	32	2.0%
25,000-30,000	20	1.3%
30,000-35,000	9	0.6%
35,000-40,000	3	0.2%
40,000-45,000	3	0.2%
45,000-50,000	4	0.3%
Above 50,000	9	0.6%
Total	1574	100.0%

Table 2

58. By contrast, CLECs have proposed concentrations of 40,000 or 50,000 business lines before a finding of non-impairment is warranted. However, unlike BellSouth, they offer no data to support their proposals.

59. In addition, adopting the CLEC proposals would have no meaningful impact. Under the Loop and Transport CLEC Coalition's proposal, BellSouth would be required to continue providing unbundled interoffice transport on nearly every route in its region because only nine of BellSouth's 1574 wire centers (0.5%) have 50,000 or

more business lines, and only five are in the same LATA (three in the Atlanta LATA and two in the Miami LATA). The same is true under ALTS's proposal because of the 16 BellSouth wire centers with 40,000 or more business lines (1%), only two LATAs have more than one such office (six in the Atlanta LATA and three in the Miami LATA). These proposals would not limit the scope of unbundling in any practical way and would result in unbundled transport continuing to be made available on nearly a ubiquitous basis, which the courts have already found to be an unacceptable result.

60. BellSouth's comments and my affidavit laid out the relationship between the number of lines it proposed and various indicators of competition. In this affidavit, I will show why BellSouth proposed 5,000 business lines as the appropriate "cut off" by examining the variations in the characteristics of central offices by business line size in small increments. As will be seen, there is clearly a distinction between the characteristics of central offices with fewer than 5,000 business lines and those with 5,000 or more business lines. The differences in each 5,000 increment above BellSouth's proposed level are smaller and smaller. In fact, in relationship to the characteristics that make a central office attractive to competitors, the CLECs' proposals of central offices with 40,000 or 50,000 business lines are not distinct from, and indeed appear to be very similar to, central offices with far fewer business lines.

61. First, BellSouth looked at fiber-based collocations as an indicator of competitive fiber optic deployment. Fiber-based collocation is a readily accessible indication of the level of competition in an area, as it clearly shows that alternative networks have

been deployed and are accessible from a particular central office. Furthermore, the presence of even one fiber-based collocation or fiber optic network is evidence that carriers can enter and have entered the market. As is seen in Table 3, the CLECs' proposals have no basis in relation to the number of fiber-based collocators. Whereas only 3.1% of central offices with fewer than 5,000 business lines have at least one fiber-based collocator, more than half of central offices with just 5,000 to 10,000 business lines do and more than three-quarters of all central offices with 10,000 to 15,000 business lines do. All central offices with more than 25,000 business lines have at least one fiber-based collocator, which underscores the inappropriateness of a 40,000 or 50,000 business line cut off as proposed by the Loop and Transport CLEC Coalition and ALTS.

Central Offices By No. of Business Access Lines	Number of Fiber-Based Collocators				
	0	1+	2+	3+	4+
Below 5,000	96.9%	3.1%	1.0%	0.1%	0.1%
5,000-10,000	45.2%	54.8%	25.1%	11.1%	4.5%
10,000-15,000	22.3%	77.7%	53.2%	36.2%	17.0%
15,000-20,000	17.9%	82.1%	75.0%	66.1%	53.6%
20,000-25,000	3.1%	96.9%	84.4%	81.3%	65.6%
25,000-30,000	0.0%	100.0%	95.0%	95.0%	90.0%
30,000-35,000	0.0%	100.0%	100.0%	100.0%	100.0%
35,000-40,000	0.0%	100.0%	100.0%	100.0%	100.0%
40,000-45,000	0.0%	100.0%	100.0%	100.0%	100.0%
45,000-50,000	0.0%	100.0%	100.0%	100.0%	100.0%
Above 50,000	0.0%	100.0%	100.0%	100.0%	100.0%

Table 3

62. BellSouth also examined demand in central offices to determine where potential deployment could occur. This demand was measured by BellSouth's annual special access services revenue. This measurement reflects the extent to which a market exists for "premium" telecommunications services and thus provides an indication

where competitive fiber optic facilities could readily be deployed. CLECs acknowledged in their comments that demand in an area is a good indication of where competition can exist and that concentrations of business lines are good indications of that demand. ALTS, for instance, states, "...the entry barriers associated with self-deployment are most likely to be overcome along routes where revenue opportunities are greatest...[and w]ire centers serving relatively large concentrations of business lines offer relatively large revenue opportunities to competitors." (p. 80, 82) Covad affiants Derodeff, Bennet, and Richman state that alternative facilities "...tend to be concentrated in highly urban, dense business markets with sufficient revenue opportunities to attract multiple fiber-based competitive entrants." (¶47)

63. Table 4 shows that CLECs' proposals have no basis in relation to the potential revenue as shown by BellSouth's special access revenue. The vast majority of BellSouth's annual special access revenues are in offices with at least 5,000 business lines.

Central Offices By No. of Business Access Lines	Annual Special Access Revenues					
	$200K+	$400K+	$600K+	$800K+	$1M+	$2M+
Below 5,000	15.6%	4.6%	1.7%	1.0%	0.6%	0.2%
5,000-10,000	95.5%	79.4%	52.3%	32.7%	24.6%	3.0%
10,000-15,000	97.9%	94.7%	86.2%	73.4%	57.4%	13.8%
15,000-20,000	100.0%	100.0%	100.0%	96.4%	91.1%	62.5%
20,000-25,000	100.0%	100.0%	96.9%	96.9%	96.9%	81.3%
25,000-30,000	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
30,000-35,000	100.0%	100.0%	100.0%	100.0%	100.0%	88.9%
35,000-40,000	100.0%	100.0%	100.0%	100.0%	100.0%	66.7%
40,000-45,000	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
45,000-50,000	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
Above 50,000	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Table 4

Loop Impairment Proposals

64. Before addressing the proposals for loop impairment tests, the Commission must address the appropriate market definition for loops. As with transport, commenters have urged the Commission to address loop impairment on a location-specific basis. And as with transport, the Commission should reject this approach. A location-specific market ignores the realities of the deployment decisions faced by carriers, which are based on a broader market than a single building or customer, and would, of necessity, have a "ubiquitous" deployment standard.

65. Carriers who chose to self-deploy facilities build a ring in the areas where demand is likely to be highly concentrated. CompTel describes the process. "...[W]hen considering whether and where to deploy facilities, CLECs consider the customers that will or may be served along various transmission paths (*i.e.*, the addressable demand) and compare the potential resulting revenues to the costs of deployment." (p. 14) XO describes the process it uses to determine where to deploy loops, in part based upon the location of its fiber rings, as "...identif[ying] geographically proximate commercial buildings that house as many potential customers as possible; if such customers are located in buildings that are reasonably close together, we attempt to design and build the metro ring to pass directly by as many of those buildings as possible. Buildings that are directly on XO's Metro Fiber Ring can be served with our own loop facilities." (Tirado ¶14)

66. Once the appropriate market has been determined, the Commission must turn to the appropriate test. The types of tests proposed by commenters for loops are similar to those proposed for transport. Again, there are three main types for both DS3 and

DS1 loops, although the exact proposals are more limited for DS1s: (1) those that rely on a proxy; 2) those that rely on the capacity limit set forth in the *Triennial Review Order*; and 3) those that rely on the *Triennial Review Order* triggers. Some commenters advocate that no test is needed and that the Commission should find impairment for loops without exception. I will address these in reverse order.

67. First, ATX would have the Commission make a nationwide finding of impairment without access to DS3 loops. ATX is joined in this approach by AT&T, ALTS, McLeod, and Compel, which advocate a nationwide impairment finding for DS1 loops. For either DS3s or DS1s, such a determination cannot be justified because ample evidence exists that, at least in some areas, carriers are not impaired without unbundled access to loops.

68. Carriers have self-deployed to some buildings. XO, as noted above (*see also* Tirado ¶6), and AT&T (p. 30) admit that they can build loops from their fiber rings. AT&T says "...the most salient fact in deciding whether a CLEC could economically extend a lateral to a particular building [is] whether or not the carrier has already-built metropolitan fiber in place with a pre-designed access point in close proximity to the specific customer location." (D'Apolito and Stanley ¶11) The Loop and Transport CLEC Coalition claims that there are certain conditions "(*i.e.* existing fiber rings, campus environments, multi-tenant buildings, anchor tenants, *etc.*) that have allowed Time Warner Telecom to economically justify a certain level of fiber runs to end user customers...." (Kunde ¶17)

69. These carriers argue that they cannot provide DS3 or DS1 services via these facilities. However, they would have the Commission ignore the availability of

channelization equipment to make full use of the fiber that has been deployed. ALTS argues that channelization is infeasible, claiming that the investment associated with offering "stand-alone DS3 circuits to wholesalers or to other occupants of multi-unit buildings … using SONET technology", which requires "channelized digital circuits over optical facilities", constitutes a "significant entry barrier even in those buildings where a carrier has deployed its own fiber." (p. 63) AT&T and Sprint, however, state quite the opposite with regard to the difficulty and expense of adding channelization equipment. AT&T says a carrier that already deployed fiber to the premises "can add substantial capacity by *merely* changing electronics in the central office." (p. 61, emphasis added) Clearly, AT&T does not think adding capacity by adding channelization equipment is significant. Moreover, Sprint says, "ILECs should be required to add electronics (such as add-drop multiplexers) at TELRIC for equipment that is normally deployed in their network…" (p. 40) It should be no more difficult for an efficient CLEC to add such equipment than it is for ILECs and no more expensive.

70. In addition, as shown in my affidavit, in many instances carriers are making use of ILEC special access services to provide service to end users. PAETEC, for instance, says it provides service using special access when its customers "require[e] at least a DS-1 sized circuit". (p. 5) Selwyn does not deny that carriers are using special access DS1s to provide service to end users, but instead claims that CLEC use of special access only shows that CLECs are not deploying fiber where the demand is for DS1s. (¶34) Apparently, these CLECs have chosen to use special

access because it is an option that allows the CLEC to compete with the ILEC without deploying its own facilities.

71. XO argues that, regardless of the fact that carriers are using DS1 special access to serve end users, carriers cannot compete using special access because "...DS1 special access is priced significantly higher than DS1 UNEs." (Emergency Petition For Expedited Determination that Competitive Local Exchange Carriers Are Impaired Without DS1 UNE Loops filed Sept. 29, 2004, in this docket, p. iv) Once again, XO is confusing impairment with higher costs. Where carriers are providing service without UNEs, there can be no impairment even if the CLEC would prefer to have a cheaper option available to it.

72. Regardless, in some cases, it is clear that carriers are simply making the choice to use ILEC special access even where UNEs are available. This is clear from the information discussed in Table 1, which demonstrates a sampling of buildings in which carriers are using special access rather than UNEs to compete.

73. The fiber maps provided by the ILECs show that carriers are using special access to serve end users even when there is competitive fiber running in front of the end user's building. AT&T (p. 105) and its affiant Selwyn (p. 35) mistakenly claim that this shows carriers cannot deploy loops. There is no basis for such a conclusion, however. These carriers have made business decisions about how to serve the end users in these buildings and have determined to use special access. It may be that special access allows the carrier to provide the services desired by the end user at a lower cost than deploying a lateral to the building from an existing fiber optic

facility. Whatever the reason for their choice, these carriers have chosen to use special access and apparently have found it to be a competitive option.

74. In addition, carriers may obtain access on a wholesale basis from other fiber providers. AT&T admits that it identified about 3,000 circuits to "'roll' from ILEC special access to CLEC facilities" this year. (Fea and Giovannucci ¶80 n. 24)

75. Second, some commenters propose that the Commission continue to rely on the triggers proposed in the *Triennial Review Order.* (ALTS, p. 4, 62; Loop and Transport CLEC Coalition, p. 114; Sprint, p. 28) As I have already described, these triggers are flawed in their practical application, involve the ability to "game" the system, and focus on an improper inquiry. ALTS takes this last point to an illogical extreme, arguing that the Commission should consider only the actual deployment since a particular entry barrier may be significant at any particular location. (p. 65) In addition to contravening the Telecommunications Act of 1996, as interpreted by the D.C. Circuit, this proposal has all of the problems associated with AT&T, MCI, and McLeod proposals, which are addressed below.

76. AT&T (p. 27), MCI (p. 126), and McLeod (p. 17) propose that the Commission's ruling in the *Triennial Review Order* that carriers are not impaired for loop facilities where they require more than 2 DS3s of capacity is a sufficient recognition of where carriers are not impaired. This test is not only location-specific, but also carrier-specific. As explained above, the Act is designed to ensure competition – not to ensure that every carrier can supply services at every location. In addition, it does not take into account the potential for self-deployment or wholesaling of facilities.

77. As described in my affidavit, BellSouth's proposal for a proxy test to show competition in the loop market is the number of business access lines in a central office. In my affidavit, BellSouth's reasons for this proxy and the examination of the appropriate number were detailed. I will describe here why BellSouth believes 5,000 business access lines in a central office is both reasonable and appropriate. As with transport, I will show the differences in characteristics of central offices with fewer than and at least 5,000 business lines by looking at the analysis by grouping central offices in increments of 5,000 business lines. The distinction between the characteristics of central offices with at least 5,000 business lines and those of central offices with fewer than 5,000 business lines is clear.

78. Table 5 shows the difference between the concentration of CLEC lit buildings in central offices with less than 5,000 business lines (only 14.5% in 72.7% of all the central offices) and the concentration in those central offices with just 5,000 to 10,000 business lines (29.3% versus 12.6% of the total number of central offices). Almost half of all the central offices with known CLEC lit buildings have between 5,000 and 15,000 business lines.

Central Office by No. of Business Access Lines	Percent of Central Offices with Known CLEC Lit Buildings	Percent of Central Offices
Below 5,000	14.5%	72.7%
5,000-10,000	29.3%	12.6%
10,000-15,000	17.4%	6.0%
15,000-20,000	14.5%	3.6%
20,000-25,000	9.3%	2.0%
25,000-30,000	6.1%	1.3%
30,000-35,000	2.9%	0.6%
35,000-40,000	1.0%	0.2%
40,000-45,000	1.0%	0.2%
45,000-50,000	1.3%	0.3%
Above 50,000	2.9%	0.6%

Table 5

79. Table 6 shows that 92.4% of the central offices with less than 5,000 business lines have at least 50 buildings in which CLECs are using DS1 special access circuits to serve end users. By contrast, 90.8% of the central offices with between 5,000 and 10,000 business lines have *more than* 50 buildings in which CLECs are using DS1 special access circuits to serve end users. At each increment in the sizes of central offices, the percentage of central offices with more than 50 buildings in which CLECs are using DS1 special access circuit to serve end users is very high. However, in central offices with at least 40,000, CLECs no longer appear to use special access services in this way. In the largest central offices, then, CLECs are apparently using non-ILEC facilities to provide high-capacity services to these end users.

Central Offices by No. of Business Access Lines	Number of Buildings Served by CLECs using SpA to Serve End Users			
	0	1-20	21-50	51+
Below 5,000	16.9%	59.4%	16.2%	7.6%
5,000-10,000	0.0%	0.0%	9.2%	90.8%
10,000-15,000	0.0%	0.0%	1.1%	98.9%
15,000-20,000	0.0%	0.0%	0.0%	100.0%
20,000-25,000	0.0%	0.0%	0.0%	100.0%
25,000-30,000	0.0%	0.0%	0.0%	100.0%
30,000-35,000	0.0%	0.0%	0.0%	100.0%
35,000-40,000	0.0%	0.0%	0.0%	100.0%
40,000-45,000	NA	NA	NA	NA
45,000-50,000	NA	NA	NA	NA
Above 50,000	NA	NA	NA	NA

Table 6

80. Table 7 shows that central offices with fewer than 5,000 business lines account for considerably lower levels of special access revenues. For example, only 12.1% of the central offices with fewer than 5,000 business lines had special access revenues

from CLECs serving end users that were in excess of $200,000 annually. By contrast, more than 85% of the central offices with between 5,000 and 10,000 business lines and nearly 97% of those with between 10,000 and 15,000 business lines had special access revenues from CLECs serving end users that exceeded $200,000 annually. The differences at every level at the 5,000 business line break point are dramatic.

Central Offices by No. of Business Access Lines	Annual Special Access Revenues from CLECs Serving End Users						
	<$100K	$100K+	$200K+	$400K+	$600K+	$800K+	$1M+
Below 5,000	72.3%	27.7%	12.1%	2.0%	0.6%	0.3%	0.1%
5,000-10,000	5.5%	94.5%	85.4%	52.8%	26.6%	13.1%	6.0%
10,000-15,000	1.1%	98.9%	96.8%	85.1%	62.8%	39.4%	27.7%
15,000-20,000	0.0%	100.0%	100.0%	92.9%	80.4%	69.6%	60.7%
20,000-25,000	0.0%	100.0%	100.0%	93.8%	84.4%	75.0%	65.6%
25,000-30,000	0.0%	100.0%	100.0%	100.0%	100.0%	100.0%	85.0%
30,000-35,000	0.0%	100.0%	100.0%	100.0%	100.0%	88.9%	88.9%
35,000-40,000	0.0%	100.0%	100.0%	100.0%	100.0%	66.7%	66.7%
40,000-45,000	0.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
45,000-50,000	0.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
Above 50,000	0.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Table 7

81. Until reaching the highest levels of revenue in Table 7, the greatest difference in every variable at every level examined happens at the 5,000 business line level. Given the need for a simplified test and that these items all show the presence of existing competition or indicate that competition is possible and that there is a clear break point in the characteristics of central offices at the 5,000 business line level, the Commission should find that CLECs are not impaired without access to unbundled high-capacity loops from any central office with 5,000 or more business lines.

Dark Fiber

82. Some commenters have proposed tests similar to their transport and loop test proposals to apply to dark fiber. When carriers deploy fiber, they deploy far more strands of fiber than they currently need. This is because the incremental cost of deploying additional strands is very low. In other words, where fiber exists, there is also dark fiber. If carriers are not impaired without access to lit fiber, of any sort, then they cannot be impaired without access to the dark fiber. The Commission should consider the evidence presented above and find that carriers are not impaired without unbundled access to dark fiber in central offices with more than 5,000 business lines.

83. Alpheus (p. 31) and ALTS (p. 67) argue that lit fiber is not a substitute for dark fiber. However, as CompTel points out, it is a "...commonsense notion that dark fiber is operationally the same as lit fiber..." (p. 32) The use of dark fiber is a different business proposition for the requesting carrier, so Alpheus and ALTS are correct that their business model may not work with access to only lit fiber. However, as Alpheus notes, the deploying carrier has every incentive to make the dark fiber available to requesting carriers, because the "rates represent 100% pure profit as the element otherwise lays dormant, unused by anyone." (p. 10) This applies no matter who the deploying carrier is. Covad affiants Derodeff, Bennett, and Richman confirm that wholesale alternatives are available. "...Covad has obtained dark fiber from alternative wholesale providers in the few instances it has undertaken such deployments." (p. 27)

Entrance Facilities

84. In the *Triennial Review Order*, the Commission redefined dedicated transport such that inter-network connections are no longer considered UNEs. The DC Circuit Court remanded this decision to the Commission primarily on the grounds that the Commission did not adequately explain its reasoning. Several commenters in this proceeding have urged the Commission to revisit its decision and require ILEC to provide entrance facilities as UNEs, either via the transport decision or by requiring entrance facilities as a separate network element subject to the loop triggers (Alpheus, p. 73). There is no basis for such a requirement. The market for entrance facilities may be the most competitive market in the industry. AT&T repeatedly admits in its comments that CLECs primarily deploy fiber optic facilities to transport traffic between ILEC central offices and the CLEC's switch. (for example, p. 43, 79)

85. Further, entrance facilities are, in almost every case, new facilities. There is no reason to require ILECs to assume the risk of deploying stranded facilities for requesting carriers who have not "achieved traffic volumes such that self-deployment of entrance facilities becomes efficient" (ALTS, p. 90) – at least not without allowing the ILEC to set its prices to account appropriately for the risk. As discussed in my affidavit, for new facilities, ILECs and CLECs are equally capable of deploying facilities and face the same issues with deployment.

Enhanced Extended Loops ("EELs")

86. Carriers argue that EELs, particularly DS1 EELs, should be available as a separate network element found to be a element for which the Commission should find nationwide impairment out of hand (Loop and Transport CLEC Coalition, p. 76, McLeod p. 22-24) or pursuant to triggers similar to those chosen by the Commission for transport and loops (ATX *et al.*, p. 24-25). The Commission should reject this notion. Without question, an EEL is a combination of individual elements – both of which are addressed by the Commission's rules separately. There is no reason to address them together. If a carrier is not impaired without access to one or both "piece parts" of an EEL, then simply combining those piece parts does not create impairment.

87. In any event, the Commission should mandate that there will be no conversion of EELs, or any special access elements, to UNEs. Carriers have had the ability to order UNEs since 1996 and EELs since 2000. Carriers made the choice to order special access services. (In BellSouth's region, nearly 87% of all DS1 loop and transport combinations are purchased as special access, while over 99% of all DS3 loop and transport combinations are purchased as special access. When BellSouth's three largest interexchange carrier customers are removed from the totals, these percentages decrease to 62% of the DS1 loop/transport combinations and 98% of DS3 loop/transport combinations.) In addition, if a carrier has been using special access to provide service to an end user, the carrier is obviously not impaired without it. Indeed, fully 99% of all DS1 and DS3 loop/transport combinations

provisioned by BellSouth to its three largest interexchange carrier customers are provisioned as special access circuits.

88. Carriers are also urging this Commission to remove all use restrictions from EELs. (AT&T, p. 135) The Commission should refuse to be misled by the CLECs' claims. Interexchange and CMRS carriers are not impaired without access to EELs, or other UNEs. Nor are CLECs impaired in offering these services without such access. As the D.C. Circuit made clear, absent a finding of impairment, there can be no unbundling requirement.

89. First, no impairment analysis has been done with regard to either CMRS or interexchange services. However, given the long-standing use of special access to provide these services and the long history of strong competition in these markets, no impairment could possibly be found for either service. CMRS providers (Sprint; T-Mobile) have not provided any evidence to overcome the strong presumption of wireless non-impairment that permeates *USTA II*. Rather these carriers again claim that they are impaired simply because of the possibility of providing the services they seek to provide at a lower cost than they have previously been able to access. (Selwyn p. 84) There is no basis for impairment in this argument. The courts have clearly noted that increased cost does not constitute impairment and in this case, the costs will not be increased at all, but rather will stay the same as they have always been.

90. Further, this issue has been addressed by the courts as well as by the Commission in the TRO, the record compiled in the context of the four wireless petitions for

reconsideration of the Triennial Review Order,[1] and in the record established in this proceeding.[2] In all of these cases, it has been made clear that impairment does not exist with respect to CMRS services.

91. In light of the fact that carriers are not impaired without access to UNEs when seeking to provide wireless and/or interexchange services, the Commission should ensure that UNEs are not abused for the provisioning of these services. In the TRO, the Commission chose to remove the use restrictions it had placed on EELs. The Commission should reinstitute these requirements as measuring the usage is the only means of determining how the facilities are actually being used. The Commission's architectural requirements only address how a facility *could* be used.

92. AT&T claims that the service eligibility requirements in the *Triennial Review Order* prevent carriers from providing private line services via EELs. (p. 144) However, it does not appear that other carriers are in any way impaired with regard to providing these services. The Yankee Group (March 2004, *Wholesale Transport Services Survey Summary Shows Rising Demand*, by J.P. Gownder) reports that interexchange carriers are the preferred carrier for these types of services in the wholesale market. CLECs are the provider of choice for 8% of respondents and the next preferred provider in an additional 16%.

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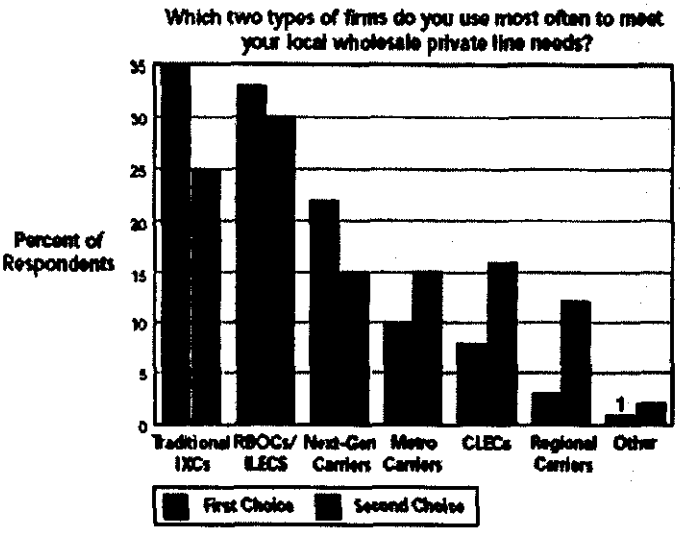
[1] Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, Public Notice, Report No. 2635 (Oct. 9, 2003); 68 F.R. 60391 (Oct. 22, 2003). This record has in turn been incorporated into this proceeding. *Notice*, ¶ 12

[2] BellSouth Comments at 63-66, BellSouth App. Tab 32 (Reply Declaration by National Economic Research Associates, Inc., "Claim: CMRS Providers are Impaired Without the Availability of Dedicated Transport on a UNE Basis" (July 17, 2002) ("NERA 2002 CMRS Impairment Analysis")); SBC Comments at 22-24 ("As the D.C. Circuit has recognized, the overwhelming evidence of remarkable growth and robust competition in the wireless industry without access to UNEs demonstrates that there is no lawful basis to find impairment or impose unbundling in that market); Verizon Comments at 71-74. *UNE Fact Report 2004* § II.B.1.

Exhibit 8.
IXCs and ILECs Are Leading with Options for Metro Private Line
Source: The Yankee Group, 2004



93. The Loop and Transport CLEC Coalition argues that use restrictions are unnecessary because "the Commission should not regulate to solve problems that have not been proven (and cannot at this juncture be proven) to exist." (p. 121) The Commission has regulated in such circumstances, and indeed, carriers are urging this Commission to do so now with regard to the supposed impairment that interexchange carriers will face when confronted with competing with ILECs in the long distance market. It is also important to note that abuse of the use restrictions from the Supplemental Order Clarification are difficult to prove, given that CLECs have generally refused BellSouth the right to conduct audits to ensure compliance with those restrictions. The Loop and Transport CLEC Coalition fails to note that BellSouth has been granted audit rights as the result of several state complaints and is hopeful of receiving similar rulings in other pending cases. Further, the Loop and

Transport CLEC Coalition mistakenly implies that BellSouth is not seeking to audit of "legacy IXC[s]". (p. 121) This is not true. BellSouth has twice initiated audits of MCI's EELs in the past two years. The first was sidelined due to MCI's bankruptcy. The second was recently initiated.

94. This concludes my affidavit.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Shelley W. Padgett
Assistant Director – Regulatory & Policy Support
Interconnection Services

Subscribed and sworn to before me

This 19th day of October, 2004

Notary Public

Gay P. Ditz
Notary Public, DeKalb County
Georgia
My Commission Expires
February 09, 2007